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DEPARTMENT OF COMMERCE

Bureau of Industry and Security

15 CFR Parts 740 and 742

[Docket No. 140812661-4661-01]

RIN 0694-AG24

Revisions to License Exception Availability for Consumer Communications Devices and Licensing Policy for Civil Telecommunications-related Items Such as Infrastructure Regarding Sudan

AGENCY: Bureau of Industry and Security, Commerce.

ACTION: Final rule.

SUMMARY: This rule amends the Export Administration Regulations to revise the general licensing policy of denial to one of case-by-case licensing for exports and reexports to Sudan of telecommunications equipment and associated computers, software, and technology for civil end use, including items useful for the development of civil telecommunications network infrastructure. It also revises License Exception Consumer Communications Devices (CCD), which previously applied only to consumer communications devices to Cuba, to authorize exports and reexports of such devices to Sudan. Additionally, it makes minor technical changes

to the list of items that are eligible for both Sudan and Cuba under the license exception. This rule also makes changes to License Exception Temporary Imports, Exports, Reexports and Transfers (in-country) (TMP) in light of the changes to License Exception CCD. Finally, it removes a license requirement for reexports to Sudan of certain telecommunications software. BIS is making these changes consistent with the U.S. Government's commitment to the advancement of the free flow of information to, from, and within Sudan, including during a national dialogue.

DATES: The rule is effective [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FOR FURTHER INFORMATION CONTACT: Theodore Curtin, telephone (202) 482-4252, email theodore.curtin@bis.doc.gov.

SUPPLEMENTARY INFORMATION:

Background.

Section 742.10 of the Export Administration Regulations (EAR) requires a license for antiterrorism reasons for the export and reexport of most items on the Commerce Control List, Supp. 1 to part 774, to Sudan in keeping with Sudan's designation as a state sponsor of terrorism. These items include certain consumer communication devices and related software and telecommunications infrastructure items that do not require a license for export or reexport to most destinations. Prior to publication of this rule, the EAR imposed a general policy of denial on applications for export or reexport of many of these items to Sudan. This rule modifies that

policy to one of case-by-case review with respect to telecommunications equipment and associated computers, software and technology for civil end use, including items useful for the development of civil telecommunications network infrastructure. This rule also makes certain telecommunications software that was subject to a reexport license requirement prior to this rule's publication eligible for reexport to Sudan without a license and authorizes use of a license exception to export or reexport consumer communications devices to Sudan. This rule is being published simultaneously with a Department of the Treasury, Office of Foreign Assets Control general license in the Sudanese Sanctions Regulations (31 CFR part 538) for export or reexport of certain services, hardware, and software incident to personal communications to Sudan. BIS is publishing this rule after consultations with the Department of State to facilitate communication and the free flow of information among the Sudanese people, including by providing them with access to communications tools.

Specific Changes Made by This Rule.

Expansion of License Exception Consumer Communication Devices (CCD) and Implementation of Conforming Change to License Temporary Imports, Exports, Reexports and Transfers (in-country) (TMP)

This rule revises § 740.19 of the EAR (License Exception CCD) to add Sudan as an eligible destination. This license exception authorizes export and reexport of consumer communications devices (commodities such as computers, communications equipment and related items including personal computers, mobile phones, televisions, radios and digital cameras) that are widely available for retail purchase and that are commonly used to exchange information and facilitate interpersonal communications, as well as certain telecommunications-

and information security-related software. Prior to publication of this rule, Cuba was the only eligible destination under License Exception CCD. This rule also makes some additions and other changes to the license exception related to the addition of Sudan. The changes related to Sudan are:

- Adding certain Global Positioning System receivers or similar satellite receivers as eligible items for export and reexport to Sudan under this license exception; and
- Limiting availability of the license exception to certain consumer software that is distributed free of charge in situations where the government of Sudan is the end user.

Many of the items eligible for export and reexport under this license exception are designated EAR99. Consequently, prior to the publication of this rule, they did not require a license from BIS for export or reexport to Sudan under most circumstances (i.e., circumstances that do not trigger end-use or end-user concerns under part 744 of the EAR). Similarly, commodities classified under Export Control Classification Number (ECCN) 5A992 generally did not require a license from BIS for reexport to Sudan in the absence of part 744-related end-use and end-user concerns. The publication of this rule does not change these two general practices. Adding Sudan to License Exception CCD as an eligible destination does not impose a license requirement for such items. However, the license exception would be available for the export or reexport to Sudan of items listed on the CCL that would otherwise require a license.

BIS is making these changes to License Exception CCD to facilitate the supplying of communications capabilities to people in Sudan in support of the U.S. Government's policy to promote the Sudanese people's communication among themselves and with the outside world, including during a national dialogue where the Sudanese people may participate in broad

discussions to address their longstanding concerns regarding governance. This rule is intended to facilitate inclusive and broad participation in such a dialogue by making the necessary communications tools available to the Sudanese people. These changes are being made in coordination with a general license being published simultaneously by the Department of the Treasury, Office of Foreign Assets Control and added to the Sudanese Sanctions Regulations (31 CFR part 538) that generally authorizes the export and reexport to Sudan of certain services, hardware, and software incident to personal communications.

Changes to License Exception CCD affecting items eligible for Cuba and Sudan.

This rule adds a note that defines the term “consumer” for purposes of paragraph (b), which applies the term “consumer” when describing the commodities and software in paragraphs (b)(1) – computers, (b)(2) – disk drives and solid state storage equipment, (b)(12) – information security equipment, software and peripherals and (b)(17) – software. This addition is not a substantive change to the scope of License Exception CCD. This addition emphasizes the consistency of this rule with the related general license being published simultaneously by the Department of the Treasury, Office of Foreign Assets Control , which includes this definition of “consumer” in connection with commodities and software.

Conforming change to License Exception TMP.

This rule also removes the provision of License Exception TMP (§ 740.9(a)(2) of the EAR) related to tools of trade being temporarily taken to Sudan for a specific class of persons for certain specified purposes (generally, temporary exports and reexports by non-governmental

organizations and related individuals, including employees and contractors, for development or humanitarian purposes) because it is no longer necessary. With the changes made by this rule, License Exception CCD now authorizes all of the exports and reexports that were authorized by that provision of License Exception TMP without the limitations imposed by License Exception TMP on duration, class of persons who may use the license exception, and end use.

Certain Telecommunications Software Made Eligible for Reexport to Sudan without a license.

This rule makes software controlled under ECCN 5D992.b or .c eligible for reexport to Sudan without a license from BIS. Software controlled under ECCN 5D992.b has the characteristics of, or performs or simulates the functions of, telecommunications equipment and information security equipment controlled under ECCN 5A992.a or .b. Commodities controlled under ECCN 5A992 were eligible for reexport to Sudan without a license from BIS prior to the publication of this rule. This change makes software that shares the characteristics of and/or performs or simulates the same functions as the hardware (commodities) eligible for reexport to Sudan on the same terms as the commodities themselves. Software controlled under ECCN 5D992.c includes mass market software such as mobile apps that may promote personal communications by the Sudanese people.

Adoption of case-by-case license application review policy.

This rule revises the statement of antiterrorism licensing policy for Sudan set forth in § 742.10 of the EAR to provide that license applications for export or reexport to Sudan of “telecommunications equipment and associated computers, software and technology for civil end

use, including items useful for the development of civil telecommunications network infrastructure” will be considered on a case-by-case basis rather than being subject to a general policy of denial. This change is being made to allow BIS and the other agencies that review such applications to further U.S. government policy of advancing the free flow of information to, from and within Sudan and to facilitate the Sudanese people’s communications among themselves and with the outside world. BIS recognizes the importance of adequate civil telecommunications network infrastructural capability to enable the Sudanese people to engage in secure, effective, and reliable personal communications.

Rulemaking Requirements

1. Executive Orders 13563 and 12866 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety effects, distributive impacts, and equity). This rule does not impose any regulatory burden on the public and is consistent with the goals of Executive Order 13563. This rule has been determined to be significant for purposes of Executive Order 12866.

2. Notwithstanding any other provision of law, no person is required to respond to, nor shall any person be subject to a penalty for failure to comply with, a collection of information subject to the requirements of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) (PRA), unless that collection of information displays a currently valid Office of Management and Budget (OMB) control number. This rule involves a collection of information approved under OMB control number 0694-0088 – Simplified Network Application Processing+ System

(SNAP+) and the Multipurpose Export License Application which carries an annual estimated burden of 31,833 hours. BIS believes that this rule will have no material impact on that burden. To the extent that it has any impact at all, the impact would be to reduce the burden because this rule makes some transactions that would otherwise require a license eligible for a license exception.

3. This rule does not contain policies with Federalism implications as that term is defined under Executive Order 13132.

4. BIS finds good cause under 5 U.S.C. 553(b)(B) to waive prior notice of proposed rulemaking and the opportunity for public comment because it is impracticable and contrary to the public interest. BIS is publishing this rule as part of a State Department-led initiative to promote the free flow of information and to facilitate communications by the Sudanese people. This rule supports that initiative by reducing the procedural requirements needed to send personal communications devices, such as mobile phones, that are the instruments of modern communications to Sudan. Ensuring that the Sudanese people have tools to communicate freely is particularly vital. In a joint statement issued on September 18, 2014, the United States, the United Kingdom, and Norway reiterated their “support for a mediation architecture that facilitates both resolution of conflict and a comprehensive process of national dialogue.” The time needed to conduct a notice and public comment would thwart the purpose of this rule, which is to enhance communications, including during a national dialogue period. Consistent with the initiative, this rule amends the EAR to allow case-by-case review of license applications to send telecommunications-related items, including items useful for the development of civil telecommunications infrastructure, to Sudan. In coordination with BIS, the Department of the Treasury, Office of Foreign Assets Control (OFAC) is amending the Sudanese Sanctions

Regulations (31 CFR part 538) to authorize similar transactions involving the exportation of certain services, software, and hardware incident to personal communications. The time that would be required for notice and opportunity for public comment required by 5 U.S.C. part 553 for BIS's rule would undermine the opportunity for enhanced communications and information flow, thereby causing the rule to fail to meet the objective of promoting the Sudanese people's ability to communicate in a free, robust, and secure manner. Delay in publication of this rule would be contrary to the public interest because it would undermine the ability of the Sudanese people to participate fully in a national dialogue.

BIS also finds good cause under 5 U.S.C. 553(d)(3) to waive the 30-day delay in effectiveness. This rule amends the EAR to allow case-by-case review of license applications to send telecommunications-related items, including items useful for the development of civil telecommunications infrastructure, to Sudan. The 30-day delay in effectiveness otherwise required under 5 U.S.C. 553 would undermine the opportunity for enhanced communications and information flow, thereby causing the rule to fail in its objective, which is to promote the Sudanese people's ability to communicate in a free, robust, and secure manner including during a national dialogue. This final rule is being implemented with immediate effectiveness to be concurrent with OFAC's publication of its regulatory changes, which are also being made effective upon publication. Prompt, simultaneous publication is important in light of the fact that certain transactions with Sudan require authorization under both the EAR and the Sudanese Sanctions Regulations. For example, an export of an item might require an export license from BIS and a separate license from OFAC. Payment for the export might also require authorization from OFAC. Simultaneous publication would permit effective implementation of the changes to the two agencies' regulations. In particular, it would ensure that an export transaction authorized

under OFAC's general license pertaining to certain software, hardware, and services incident to personal communications would be eligible for a license exception under the EAR rather than requiring a license from BIS, thereby effectuating the U.S. Government's policy to advance personal communications in Sudan.

List of Subjects

15 CFR Part 740

Administrative practice and procedure, Exports, Reporting and recordkeeping requirements.

15 CFR Part 742

Exports, Terrorism.

For the reasons set forth in the preamble, the Export Administration Regulations (15 CFR parts 730 – 774) are amended as follows:

PART 740 – [AMENDED]

1. The authority citation for 15 CFR part 740 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 7201 *et seq.*; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Notice of August 7, 2014, 79 FR 46959 (Aug. 11, 2014).

§ 740.9 – [Amended]

2. Section 740.9 is amended by:

- a. Removing the semicolon and the phrase “for Sudan, see paragraph (a)(2) of this section” from the first sentence of paragraph (a)(1); and
- b. Removing and reserving paragraph (a)(2).

3. Section 740.19 is amended by:

- a. Revising paragraph (a);
- b. Revising paragraph (b) introductory text;
- c. Removing the word “and” from the end of paragraph (b)(16);
- d. Removing the period from the end of paragraph (b)(17) and adding in its place a semicolon followed by the word “and”;
- e. Adding paragraph (b)(18);
- f. Adding a note to paragraph (b); and
- g. Revising paragraph (c).

The revisions and additions read as follows:

§ 740.19 Consumer Communications Devices (CCD).

(a) *Authorizations.* This section authorizes the export or reexport of commodities and software, either sold or donated, to Cuba or Sudan subject to the requirements stated herein. This section does not authorize U.S.-owned or -controlled entities in third countries to engage in reexports of foreign produced commodities to Cuba for which no license would be issued by the Department of the Treasury pursuant to 31 CFR 515.559.

(b) *Eligible commodities and software.* Commodities and software in paragraphs (b)(1) through (17) of this section are eligible for export or reexport under this section to Cuba or Sudan. Commodities in paragraph (b)(18) of this section are eligible for export or reexport under this section to Sudan only.

* * *

(18) (Sudan only) Global Positioning System receivers or similar satellite receivers controlled under ECCN 7A994.

Note to paragraph (b): In this paragraph, the term "consumer" refers to items that are:

1. Generally available to the public by being sold, without restriction, from stock at retail selling points by means of any of the following:

a. Over-the-counter transactions;

b. Mail order transactions;

c. Electronic transactions; or

d. Telephone call transactions; and

2. Designed for installation by the user without further substantial support by the supplier.

(c) *Eligible and ineligible end-users*— (1) *Organizations*. (i) This license exception may be used to export or reexport eligible commodities and software to and for the use of independent non-governmental organizations in Cuba or Sudan.

(ii) The Cuban Government or the Cuban Communist Party and organizations they administer or control are not eligible end-users.

(iii) The Government of Sudan is not an eligible end-user for any item exported or reexported pursuant to this license exception except for consumer software that is authorized under paragraph (b)(12) or (b)(17) of this section and that is distributed free of charge.

(2) *Individuals*. This License Exception may be used to export eligible commodities and software to and for the use of individuals other than the following:

(i) *Ineligible Cuban Government Officials*. Ministers and vice-ministers; members of the Council of State; members of the Council of Ministers; members and employees of the National Assembly of People's Power; members of any provincial assembly; local sector chiefs of the Committees for the Defense of the Revolution; Director Generals and sub-Director Generals and

higher of all Cuban ministries and state agencies; employees of the Ministry of the Interior (MININT); employees of the Ministry of Defense (MINFAR); secretaries and first secretaries of the Confederation of Labor of Cuba (CTC) and its component unions; chief editors, editors and deputy editors of Cuban state-run media organizations and programs, including newspapers, television, and radio; or members and employees of the Supreme Court (Tribuno Supremo Nacional).

(ii) *Ineligible Cuban Communist Party Officials.* Members of the Politburo; the Central Committee; Department Heads of the Central Committee; employees of the Central Committee; and the secretaries and first secretaries of provincial Party central committees.

PART 742 – [AMENDED]

4. The authority citation for 15 CFR part 742 continues to read as follows:

Authority: 50 U.S.C. app. 2401 *et seq.*; 50 U.S.C. 1701 *et seq.*; 22 U.S.C. 3201 *et seq.*; 42 U.S.C. 2139a; 22 U.S.C. 7201 *et seq.*; 22 U.S.C. 7210; Sec. 1503, Pub. L. 108–11, 117 Stat. 559; E.O. 12058, 43 FR 20947, 3 CFR, 1978 Comp., p. 179; E.O. 12851, 58 FR 33181, 3 CFR, 1993 Comp., p. 608; E.O. 12938, 59 FR 59099, 3 CFR, 1994 Comp., p. 950; E.O. 13026, 61 FR 58767, 3 CFR, 1996 Comp., p. 228; E.O. 13222, 66 FR 44025, 3 CFR, 2001 Comp., p. 783; Presidential Determination 2003–23 of May 7, 2003, 68 FR 26459, May 16, 2003; Notice of August 7, 2014, 79 FR 46959 (August 11, 2014); Notice of November 7, 2014, 79 FR 67035 (November 12, 2014).

5. Section 742.10 is amended by:

- a. Revising the first sentence of paragraph (a)(2);
- b. Revising paragraph (b)(3);
- c. Redesignating the note to paragraph (b) as the note to paragraph (b)(3); and
- d. Revising the newly redesignated note to paragraph (b)(3), to read as follows:

§ 742.10 Anti-terrorism: Sudan.

(a) * * *

(2) If AT column 1 or AT column 2 of the Commerce Country Chart (Supplement No. 1 to part 738 of the EAR) is indicated in the appropriate ECCN, a license is required for *reexport* to Sudan for anti-terrorism purposes, *except* for ECCNs 2A994, 3A992.a, 5A991.g, 5A992, 5D992.b or .c, 6A991, 6A998, 7A994, 8A992.d, .e, .f, and .g, 9A990.a and .b, and 9A991.d and .e. * * *

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(b) * * *

(3) Notwithstanding the provisions of paragraphs (b)(1) and (b)(2) of this section, applications for Sudan will be considered on a case-by-case basis in the following four situations.

- (i) The transaction involves the reexport to Sudan of items where Sudan was not the intended ultimate destination at the time of original export from the United States, provided that the exports from the U.S. occurred prior to the applicable contract sanctity date.
- (ii) The U.S. content of foreign-produced commodities is 20% or less by value.
- (iii) The commodities are medical items.
- (iv) The items are telecommunications equipment and associated computers, software and technology for civil end use, including items useful for the development of civil telecommunications network infrastructure.

Note to paragraph (b)(3) of this section: Applicants who wish any of the factors described in paragraph (b)(3) of this section to be considered in reviewing their license applications must submit adequate documentation demonstrating the appropriateness of the factor: i.e., the date of export from the United States, the value of the U.S. content, the specifications and medical use of the equipment, or the specific civil end use of the item and any function the item will have in the development of civil telecommunications network infrastructure, as relevant to the factor for which consideration is sought.

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Dated: February 12, 2015

Kevin J. Wolf

Assistant Secretary for Export Administration

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